

STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals

Presiding Judge: Patrick M. Meter

MARILYN VIRGINIA MASON,
f/k/a MARILYN VIRGINIA SWEEBE,

Plaintiff/Appellant,

v

Supreme Court File No.: 126913

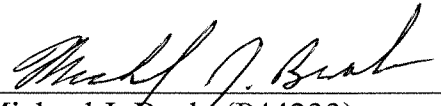
Court of Appeals No.: 253520

Circuit Court File No. 85-3517-DM-C

HERBERT ORVILLE SWEEBE,

Defendant/Appellee.

BRIEF ON APPEAL - APPELLANT'S



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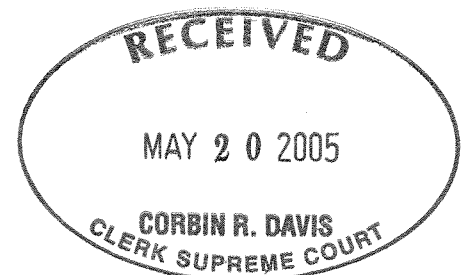


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STATEMENT OF BASIS OF JURISDICTION

On July 19, 2004, the Michigan Court of Appeals peremptorily reversed a decision by the Midland County Circuit Court and specifically Ordered Plaintiff/Appellant pay Defendant/Appellee the proceeds from a life insurance policy from the former employer of Plaintiff/Appellant's deceased ex-husband. Application for Leave to Appeal to this Honorable Court was served on the opposing parties and this Court on August 27, 2004, pursuant to MCR 7.302(B)(3) and (5). This Honorable Court granted Plaintiff/Appellant Leave to Appeal, and also granted Leave to Appeal in Pruchno v Pruchno, 2004 WL 1533854 (unpublished Michigan Court of Appeals) [Docket No. 245583], on March 31, 2005.

STATEMENT OF QUESTIONS INVOLVED

I. WHETHER THE EMPLOYEE RETIREMENT INCOME SECURITY ACT (ERISA), 29 USC §1001 et seq, PREEMPTION PROVISION PRECLUDES ENFORCEMENT OF A JUDGMENT OF DIVORCE CLAUSE REGARDING WAIVER OF ENTITLEMENT TO PROCEEDS FROM A LIFE INSURANCE POLICY WHERE THE EX-SPOUSE CONTINUED TO BE LISTED AS THE BENEFICIARY AFTER THE JUDGMENT OF DIVORCE WAS ENTERED

Plaintiff/Appellant Answers: Yes.

Defendant/Appellee Answers: No.

Trial Court Answers: Yes.

Court of Appeals Answers: No.

II. WHETHER THE ESTATE OF A DECEASED SPOUSE CAN SEEK A RECOVERY OF LIFE INSURANCE BENEFITS THROUGH THE STATE COURT WHICH HAD JURISDICTION OF THE INITIAL DIVORCE PROCEEDING, CONTRARY TO APPLICABLE FEDERAL LAW.

Plaintiff/Appellant Answers: No.

Defendant/Appellee Answers: Yes.

Trial Court Answers: No.

Court of Appeals Answers: Did not answer.

III. WHETHER THE TRIAL COURT SHALL RETAIN JURISDICTION TO REVIEW THE PROPRIETY OF PLAINTIFF/APPELLANT'S DESIGNATION AS THE BENEFICIARY OF THE ERISA COVERED LIFE INSURANCE PLAN IF THE ERISA PREEMPTION PROVISION IS FOUND INAPPLICABLE.

Plaintiff/Appellant Answers: Yes.

Defendant/Appellee Answers: No.

Trial Court Answers: Did not address.

Court of Appeals Answers: Did not address.

STATEMENT OF FACTS

A Consent Judgment of Divorce was entered between Plaintiff/Appellant, Marilyn Mason, f/k/a Marilyn Sweebe, and her now deceased ex-husband, Herbert Sweebe, on September 30, 1986. AA, 19a. Defendant, Herbert Sweebe, died as a result of self-inflicted wounds on September 17, 2001. AA, 6a. Decedent had married three times following his divorce from Plaintiff/Appellant, and was married to Respondent, Gail Sweebe, on the date of his death. AA, 20a. Ms. Gail Sweebe was appointed Personal Representative for the Estate of Herbert Sweebe and seeks to recover on behalf of his estate. AA, 19a.

Defendant/Appellee had a life insurance policy from Met Life in effect on the date of his death, as a result of his employment with General Motors Corporation prior to his retirement. AA, 20a. The insurance policy from General Motors was covered by the Employee Retirement Income Security Act (ERISA). AA, 20a. Defendant made no changes and continued to list Plaintiff/Appellant as his beneficiary until his death which was fifteen (15) years after the divorce Judgment had been entered. AA, 20a.

A letter to attorney James Boardman, counsel for Defendant/Appellee, from Metropolitan Life Insurance Company dated August 1, 2002 indicated payment of the insurance policy proceeds are made by the plan administrator to the last designated beneficiary. AA, 26a-27a. The letter noted the designation on Mr. Sweebe's Met Life insurance policy was Plaintiff/Appellant, thus payment was made to her with reliance upon the decision by the United States Sixth Circuit Court of Appeals in Metropolitan Life Insurance Co v Pressley, 82 F3d 126 (CA 6 1996). AA, 26a-27a. Defendant/Appellee filed an action in the Midland County Circuit Court on August 12, 2003 seeking enforcement of the insurance waiver provision of the Judgment of Divorce as entered on September 30, 1986. The parties filed Briefs and Supplemental Briefs, including copies of the materials in the Estate of Rowley v MacInnes, 260 Mich App 280; 677 NW2d 889 (2004), for review by the Midland County Circuit Court. AA, 16a-17a. An Opinion was issued on November 20, 2003 denying the

relief sought by Defendant/Appellee and permitting Plaintiff/Appellant to retain the life insurance proceeds paid by Metropolitan Life based upon ERISA preemption, thereby precluding enforcement of the insurance waiver provision in the Judgment of Divorce. AA, p 19a-22a. An Order was entered denying Defendant/Appellee's requested relief on December 10, 2003. AA, 23a-24a.

On December 18, 2003 Defendant/Appellee filed a Claim of Appeal seeking review of the Order from the 42nd Circuit Court for the County of Midland. On January 6, 2004, the Michigan Court of Appeals dismissed the Claim of Appeal due to lack of jurisdiction because the case presented post-Judgment of Divorce relief not related to issues of custody of a minor child, thereby not appealable as of right. On January 27, 2004, Defendant/Appellee filed a Delayed Application for Leave to Appeal, with a Supporting Brief, in the Michigan Court of Appeals. On February 13, 2004, Plaintiff/Appellant filed an Answer to the Delayed Application for Leave to Appeal with the Michigan Court of Appeals. An Order entered by the Michigan Court of Appeals on July 19, 2004 peremptorily reversed the decision by the 42nd Circuit Court for the County of Midland in lieu of granting the Delayed Application for Leave to Appeal. AA, 25a. No oral argument was allowed or conducted at the Michigan Court of Appeals as a result of the peremptory reversal.

This Honorable Court granted Leave to Appeal to Plaintiff/Appellant, and to the case of Pruchno, supra, on March 31, 2005. The Order Granting Leave to Appeal did not restrict nor specify the issues to be addressed or briefed before this Honorable Court. Plaintiff/Appellant provides the following legal analysis supporting the decision by the Midland County Circuit Court, namely application of ERISA preemption precluding enforcement of the State Court Judgment of Divorce insurance waiver provision.

ARGUMENT I

WHETHER THE EMPLOYEE RETIREMENT INCOME SECURITY ACT (ERISA), 29 USC 1001 et seq, PREEMPTION PROVISION PRECLUDES ENFORCEMENT OF A JUDGMENT OF DIVORCE CLAUSE REGARDING WAIVER OF ENTITLEMENT TO PROCEEDS FROM A LIFE INSURANCE POLICY WHERE THE EX-SPOUSE CONTINUED TO BE LISTED AS THE BENEFICIARY AFTER THE JUDGMENT OF DIVORCE WAS ENTERED

This Honorable Court is called upon to determine whether the life insurance proceeds received by Plaintiff/Appellant were properly distributed to her pursuant to the preemption doctrine of the Employee Retirement Income Security Act of 1974 (ERISA), as found by the Trial Court, or whether her right to such proceeds was waived pursuant to a provision in the Judgment of Divorce, as found by the Michigan Court of Appeals, relying upon MacInnes, *supra*. As is often the case when analyzing an ERISA situation, the proper decision will require consideration of federal jurisprudence as well as appellate jurisprudence from the State of Michigan. Plaintiff/Appellant asserts the proper resolution from this Honorable Court is application of the preemption provision of ERISA to her recovery of the life insurance proceeds as found by the Trial Court and paid by the insurer, Metropolitan Life Insurance Company. Application of the waiver doctrine as presented by Defendant/Appellee, and applied by the Michigan Court of Appeals, is contrary to the federal jurisprudence concerning application of the ERISA preemption provision and should not be followed by this Honorable Court.

A. ERISA Federal Preemption

The United States Supreme Court addressed the issue of preemption under ERISA as it relates to life insurance proceeds following the entry of a Judgment of Divorce in Egelhoff v Egelhoff, 532 US 141; 121 S Ct 1322; 149 LEd2d 264 (2001). The United States Supreme Court reviewed whether an ex-spouse would be entitled to recover life insurance proceeds from an ERISA plan because the beneficiary designation was not changed following entry of a Judgment of Divorce, or whether

the statutory provision revoking such a beneficiary designation would apply. The statutory provision in Egelhoff, supra, was similar in purpose and language to the Judgment of Divorce provisions present in MacInnes, supra, and the instant case. The language of the statutory provision in Egelhoff, supra, stated:

If a marriage is dissolved or invalidated, a provision made prior to that event that relates to the payment or transfer at death of the decedent's interest in a non-probate asset in favor of or granting an interest or power of the decedent's former spouse is revoked. A provision affected by this section must be interpreted, and the non-probate asset affected passes, as if the former spouse failed to survive the decedent, having died at the time of the entry of the decree of dissolution or declaration of invalidity. Egelhoff at 144 citing: Wash Rev Code §11.07.010(2)(a) (1994).

The provision in the Judgment of Divorce from MacInnes, supra, regarding termination of any interest in an insurance policy stated:

It is further ordered and adjudged that except as otherwise provided, all rights of either party in and to the proceeds on any policy or contract of life insurance, endowment, or annuity upon the life of the other in which said party was named or designated as beneficiary, or to which said party became entitled by assignment or change of beneficiary during the marriage or in anticipation thereof, whether such contract or policy was heretofore or shall hereafter be written or become affected, shall hereupon become and be payable to the estate of the owner of said policy, or such named beneficiary as shall hereafter be affirmatively designated. Id at 287-288.

Finally, the Judgment of Divorce provision regarding termination of the life insurance interest by Plaintiff/Appellant stated:

It is further ordered and adjudged that any interest which either of the parties may now have or may have had in any insurance contract or policy, and any other interest in any insurance contract or policy of the other party, shall be extinguished, and that the parties shall in the future hold all such insurance free and clear from any right or interest which the other party now has or may have had therein, by

virtue of being the beneficiary, contingent beneficiary or otherwise.

The effect of these separate provisions is termination of the interest of a former spouse as a beneficiary on a life insurance policy; however, the issue of significance is whether the statutory provision in Egelhoff, supra, or provision in a Michigan Judgment of Divorce, can be enforced against the proceeds from an ERISA policy, or if these provisions are contrary to the preemption provision of ERISA.¹

The Court in Egelhoff, supra, made the following pronouncement when it invalidated the Washington statutory provision cited above:

Applying this framework, petitioner argues that the Washington statute has an impermissible connection with ERISA plans. We agree. The statute binds ERISA plan administrators to a particular choice of rules for determining beneficiary status. The administrators must pay benefits to the beneficiaries chosen by state law, rather than to those identified in the plan documents. The statute thus implicates an area of core ERISA concern. In particular, it runs counter to ERISA's commands that a plan shall "specify the basis on which payments are made to and from the plan," [29 USC 1102(B)(4)], and that the fiduciary shall administer the plan "in accordance with the documents and instruments governing the plan," [29 USC 1104(A)(1)(b)], making payments to a "beneficiary" who is "designated by a participant, or by the terms of [the] plan." [29 USC 1002(A)] [footnote omitted]. In other words, unlike generally applicable laws regulating "areas where ERISA has nothing to say," [citation omitted], which we have upheld notwithstanding their incidental effect on ERISA plans, [citation omitted], this statute governs the payment of benefits, a central matter of plan administration. Egelhoff at 147-148.

The United States Supreme Court found the state statutory provision invalidated the beneficiary designation of a former spouse on an ERISA life insurance plan, thus

¹ The preemption provision states in relevant part that ERISA "shall supercede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA. 29 USC 1144(a). As the United States Supreme Court noted in Egelhoff, supra, the preemption provision will include state court judgments of divorce as state laws subject to preemption.

subject to the ERISA preemption provision and invalidated the state statutory provision. Thus, a former spouse is the proper beneficiary to receive the ERISA life insurance proceeds if listed as the designated beneficiary.

The United States Supreme Court also addressed whether the statutory provision changing the designation of the life insurance policy could be considered merely an invalidation occurring automatically upon entry of the Judgment of Divorce. The dissent in Egelhoff, supra, raised this theory for avoiding application of the ERISA preemption provision. Justice Thomas, writing for the majority in Egelhoff, supra, addressed this argument and rejected it out of hand. The majority opinion stated the following:

One can of course escape the conflict between the plan document (which require making payments to the named beneficiaries) and the statute (which requires making payments to someone else) by calling the statute an “invalidation” of the designation of the named beneficiary, and by observing that the plan documents are silent on whether “invalidation” is to occur upon divorce. The dissent employs just such an approach. [Citation omitted] Reading a clear statement as an ambiguous metastatement enables one to avoid all kinds of conflicts between seemingly contradictory text. Suppose, for example, that the statute required that all pension benefits be paid to the governor of Washington. That seems inconsistent with the plan documents (and with ERISA), but the inconsistency disappears if one calls a statute an “invalidation” of the principal and alternate beneficiary designations. After all, neither the plan nor ERISA actually says that beneficiaries cannot be invalidated in favor of the governor. This approach exploits the logical inability of any text to contain a complete set of instructions for its own interpretation. It has the vice - - or perhaps the virtue, depending upon one’s point of view - - of draining all language of its meaning. Egelhoff at 147, n 1.

Thus, the analysis of the dissent in Egelhoff, supra, is similar to the position taken by Defendant/Appellee in this matter, namely asking for this Honorable Court to

invalidate the beneficiary designation from the ERISA life insurance plan, and collect it in a collateral action rather than directly from the ERISA insurer. This invalidation argument was rejected out of hand by the majority in Egelhoff, *supra*.

The Egelhoff, *supra*, majority also found the state statutory provision was invalid because it violated the purpose for ERISA plans, namely national uniformity for plan administration. The Court stated:

The Washington statute also has a prohibited connection with ERISA plans because it interferes with nationally uniform plan administration. One of the principal goals of ERISA is to enable employers “to establish a uniform administrative scheme, which provides a set of standard procedures to guide processing of claims and disbursements of benefits.” [Citation omitted] Uniformity is impossible, however, if plans are subject to different legal obligations in different states.

The Washington statute at issue here poses precisely that threat. Plan administrators cannot make payments simply by identifying the beneficiary specified by the plan documents. [Footnote omitted] Instead they must familiarize themselves with state statutes so that they can determine whether the named beneficiary’s status has been “revoked” by operation of law. *Id* at 148.

It is this purpose and policy rationale for ERISA which Defendant/Appellee, and the Michigan Court of Appeals, focused upon for allowing a collateral attack to invalidate the beneficiary designation for the ERISA insurance proceeds. However, the analysis fails to take into consideration the other basis the United States Supreme Court cited for ERISA preemption. This is further illustrated by the decision of the United States Supreme Court in Boggs v Boggs, 520 US 833; 117 S Ct 1754; 138 LEd2d 45 (1997) as discussed in the next section.

B. ERISA Preemption – Boggs Decision

The Michigan Court of Appeals in MacInnes, *supra*, acknowledged the precedent of Egelhoff, *supra*, for application of the preemption provision in ERISA;

however, it found the analysis inapplicable after the proceeds from the ERISA Plan were distributed. The MacInnes, supra, panel found the proper analysis of this situation was pursuant to principles of waiver rather than preemption. The Court of Appeals in MacInnes, supra, stated:

We find the Egelhoff analysis inopposite because in this case the ultimate issue is not whether a state statute is preempted. To the extent that defendant contends that the provision in the divorce judgment is indirectly preempted because MCL 552.101 requires that all divorce judgments contain a provision determining the rights of the divorcing spouse to the proceeds of any life insurance policy owned by the other spouse, we disagree.

The circumstances of this case convince us that the issue presented is most appropriately resolved under principles of waiver rather than preemption. Id at 284 (emphasis added).

The Michigan Court of Appeals further determined it would not follow analysis from the Sixth Circuit Court of Appeals because there was a split in the United States Circuit Courts of Appeals as to whether waiver was appropriately considered for purposes of voiding the preemption policy of ERISA in similar situations. The Michigan Court of Appeals indicated it was not required to follow the Sixth Circuit Court of Appeals precedent when a conflict exists among the United States Court of Appeals regarding issues of federal law. Plaintiff/Appellant disagrees there was a split of authority regarding this issue because of the United States Supreme Court decision in Boggs, supra.

Although the facts and circumstances of Boggs, supra, are not completely analogous to the case at bar, the purposes and policy rationales for the decision are equally applicable to this case. Boggs, supra, involved a situation where a wife had predeceased the employed husband and had bequeathed her rights for the ERISA proceeds to their children. The participating husband subsequently remarried and died shortly thereafter which raised a dispute as to entitlement to the pension proceeds

either to the surviving widow or to the surviving children. The United States Supreme Court found the surviving spouse, Sandra Boggs, was entitled to the entirety of the proceeds pursuant to the ERISA preemption provision. The Court stated:

Sandra Boggs, as we have observed, asserts that federal law pre-empted and supercedes state law and requires the surviving spouse annuity to be paid to her as the sole beneficiary. We agree. Boggs at 841.

The Court then analyzed the reason for a surviving spouse annuity to be given to Ms. Boggs as sole beneficiary; however, another argument raised by the children of the decedent for recovery of the proceeds of the pension plan is relevant to the instant case regarding attachment to ERISA benefits after payment to the designated beneficiary, i.e. a collateral attack.

The following passage illustrates the United States Supreme Court's decision and analysis as to the ability for collateral attack to obtain benefits received pursuant to ERISA but waived based upon state law or judgments. The United States Supreme Court stated in Boggs, supra:

Respondents say their state-law claims are consistent with these provisions. Their claims, they argue, affect only the disposition of plan proceeds after they have been disbursed by the Bell South Service Retirement Program, and thus nothing is required of the plan. ERISA's concern for securing national uniformity administration of employee benefit plans, in their view, is not implicated. They argue Sandra's community property obligations, after she receives the survivor annuity payments, "fail[1] to implicate the regulatory concerns of ERISA." [Citation omitted]

We disagree. Id at 842-843.

The United States Supreme Court analyzed the policy rationale for a surviving spouse provision in ERISA pension plans and the protection provided unless the surviving spouse specifically waived her claim with the Plan Administrator. The analysis regarding the ability for non-designated beneficiaries, or participants, to enforce a

claim for ERISA benefits was found to be contrary to the purposes and basis for the ERISA preemption policy. The Court stated:

Respondent's and their amicus in effect ask us to ignore §1002(A)'s definition of "beneficiary" and, through case law, create a new class of persons for whom plan assets are to be held and administered. The statute is not amenable to this sweeping extra textual extension. It is unpersuasive to suggest that third parties could assert their claims without being counted as "beneficiaries." A plan fiduciary's responsibilities run only to participants and beneficiaries. [Citation omitted] Assets of a plan are held for the exclusive purposes of providing benefits to participants and beneficiaries and defraying reasonable expenses of administration. [Citation omitted] Reading ERISA to provide non-beneficiary interests, even if not enforced against the plan, would result in troubling anomalies. Either pension plans would be run for the benefit of only a subset of those who have a stake in the plan or state law would have to move in to fill the apparent gaps between plan administration responsibilities and ownership rights, resulting in a complex set of requirements varying from state to state. Neither result accords with the statutory scheme. Id at 850-851 (emphasis added).

In the instant case, Defendant/Appellee has no status as a designated beneficiary under the statutory definition in ERISA and should be precluded from seeking such benefits from Plaintiff/Appellant. The United States Supreme Court specifically held it was inappropriate to allow a non-designated beneficiary the right to seek proceeds from an ERISA covered plan. In this case, Defendant/Appellee is specifically seeking beneficiary status through the collateral means of the divorce action thereby contravening the ERISA preemption policy as prohibited in Boggs, supra.

The following passage from Boggs, supra more strongly and directly addresses the ERISA preemption provision application in the instant case:

The axis around which ERISA's protections revolve is the concepts of participant and beneficiary. When Congress

has chosen to depart from this framework, it has done so in a careful and limited manner. Respondents' claims, if allowed to succeed, would depart from this framework, of setting the deliberate balance central to ERISA. It does not matter that respondents' have sought to enforce their rights only after retirement benefits have been distributed since their asserted rights are based on the theory that they had an interest in the undistributed pension plan benefits. Their state-law claims are preempted. Id at 854. (Emphasis added)

Accordingly, the United States Supreme Court specifically held benefits paid to the listed beneficiary are protected against collateral attack from a non-designated beneficiary claimant and such result is mandated by the ERISA preemption provision. Conversely, the Michigan Court of Appeals in MacInnes, supra, allowed a non-designated beneficiary the right to seek collection of ERISA life insurance proceeds in a collateral action after the proceeds were properly distributed to the designated beneficiary. This is contrary to the controlling and binding precedent of Boggs, supra, Egelhoff, supra, and the Sixth Circuit Court of Appeals decisions analyzing this issue.

C. ERISA Preemption – United States Sixth Circuit Court of Appeals and Eastern District of Michigan Decisions

The Sixth Circuit Court of Appeals has consistently determined former spouses were entitled to receipt of ERISA life insurance proceeds as the designated beneficiary despite a Judgment of Divorce provision invalidating such designation entered in the State Court.

One of the first cases to address this matter was McMillan v Parrott, 913 F2d 310(CA 6, 1990). The facts and circumstances of McMillan, supra, are analogous to the ones presented in this case. The parties had divorced a number of years before the participant died, intervening marriages had occurred and there was merely a general provision in a divorce judgment relinquishing any and all claims against insurance proceeds of the other. The Trial Court determined the Judgment of Divorce provision would control and invalidated the ex-spouse's beneficiary status; however, the Sixth

Circuit Court of Appeals reversed and found preemption under ERISA applied. The Sixth Circuit Court of Appeals stated:

The district court appears to have based its decision on state law. This we believe was incorrect. 29 USC 1144(a) of ERISA provides that federal law shall supercede all state laws which “relate to” an ERISA plan. [Citation omitted] This preemption provision is to be construed broadly; a law “relates to” an ERISA plan “if it has a connection with or reference to such a plan....” Shaw v Delta Airlines, Inc., 463 US 85, 96-97; 103 S Ct 2890, 2899-3000; 77 LEd2d 490 (1983). The designation of beneficiaries plainly relates to these ERISA plans, and we see no reason to apply state law on this issue. [Citation omitted]

* * *

We believe that the explicit provisions of ERISA made clear that Barbara Parrott did not effectively waive her interest as Dr. Parrott’s beneficiary. McMillan at 311.

The Sixth Circuit Court of Appeals concluded the Judgment of Divorce waiver provision was contrary to ERISA statutory preemption and therefore the designated beneficiary on the plan documents controls for the proper recipient of the proceeds. This is consistent with the analysis by the United States Supreme Court in Egelhoff, supra, and Boggs, supra.

The Sixth Circuit Court of Appeals also addressed waiver of the beneficiary designation, similar to the later analysis by the Michigan Court of Appeals in MacInnes, supra. The Sixth Circuit Court of Appeals found it inappropriate to apply waiver analysis in this type of situation and would not invoke it under federal common law. The Court stated:

Even if we were to resolve this question by reference to federal common law, we believe that Barbara Parrott’s waiver would not be effective here. The only cases which have applied such law have required that, to be effective, the waiver must specifically refer to the spouse’s rights as beneficiary in an ERISA plan. See Fox Valley, 897 F2d

275 (CA 7, 1990) [en banc]; Lyman Lumber, 877 F2d 692 (CA 8, 1989). The waiver provision in Barbara Parrott's divorce settlement, however emphatic, does not specifically refer to her interest as beneficiary of these ERISA plans. [Footnote omitted] We hold that Barbara Parrott is entitled, as Dr. Parrott's named beneficiary, to that portion of the proceeds of these ERISA plans which are not owed to Dr. Parrott's widow under federal law. McMillan at 312.

Thus, the Sixth Circuit Court of Appeals early on determined ERISA preemption precluded enforcement of a Judgment of Divorce provision extinguishing the designated beneficiary of the Plan, and also precluded waiver analysis to invalidate the designation of a former spouse. Ironically, the Sixth Circuit Court of Appeals cited the decision of Fox Valley, supra, from the Seventh Circuit Court of Appeals supporting the inability to use waiver of an ERISA benefit unless in conformity to the statutory provision. However, the Michigan Court of Appeals in MacInnes, supra, and Pruchno, supra, relied upon a Seventh Circuit Court of Appeals decision for "explicit waiver" of ERISA benefits. Thus, the proper analysis is to determine whether an explicit waiver of ERISA benefits was made in the Judgment of Divorce, and if not then waiver does not avoid preemption. In the instant case no mention of ERISA benefits is contained in the waiver provision, but the MacInnes and instant panels of the Michigan Court of Appeals failed to address the lack of explicit reference to ERISA insurance coverage.

McMillan, supra, was reaffirmed by the Sixth Circuit Court of Appeals in Metropolitan Life Ins Co v Pressley, 82 F3d 126 (1996). The Court in Pressley, supra, stated:

In McMillan, this court considered essentially the same question that it faces in this case: whether under the provisions of ERISA the former spouse of a decedent waives her interest as designated beneficiary of the decedent by reason of a broad waiver of rights in a couple's decree. The McMillan court answered that "the explicit provisions of ERISA make clear [the decedent's

former spouse] did not effectively waive her interest as [the decedent's] beneficiary. [Citation omitted]

Section 404(A)(1)(d) of ERISA requires that a plan administrator discharge his duties "in accordance with the documents and instruments governing the plan...." 29 USC 1104(A)(1)(d). The court in McMillan found that section to establish a clear mandate that plan administrators follow plan documents to determine the designated beneficiary. [Citation omitted] Accordingly, the court held that the plan documents naming the decedent's ex-wife as beneficiary of the plan controls, making her the decedent's beneficiary. Pressley at 130. (Emphasis added). See also: Czarski v Bonk, 124 F3d 197 (1997 WL 535773) (CA6, 1997).

These Sixth Circuit cases reflect a consistent application of ERISA preemption for facts similar to the instant case and application of federal law to determine the proper recipient of the ERISA benefits.

In Tinsley v General Motors Corp, 227 F3d 700 (CA 6, 2000) the Sixth Circuit Court of Appeals confirmed federal law controls the determination of beneficiaries for ERISA proceeds:

Moreover, this court has held that claims touching on the designation of a beneficiary of an ERISA-covered plan fall under ERISA's broad preemptive reach and are consequently governed by federal law. Id at 704.

Thus, the jurisprudence from the Sixth Circuit Court of Appeals interpreting the federal law of ERISA preemption should be given substantial consideration in assessing the proper result in this case.

There are also decisions from the United States District Court for the Eastern District of Michigan which addressed this issue and found ERISA preemption applies. In Metropolitan Life Ins Co v Gibbs, 89 F Supp2d 877 (ED Mich, 2000) the District Court found the divorce decree addressing the insurance interest of the parties within the Judgment of Divorce, as required by the Michigan statutory provision, preempted by ERISA. The Court stated:

In Pressley, the Sixth Circuit held that Michigan's statutory provision under MCL §552.101 [footnote omitted] was preempted by ERISA. The Pressley divorce decree contained the statutory waiver provision following John and Lois Gibbs's judgment of divorce. [Footnote omitted] As in this case, the insured's former wife in Pressley was still the designated beneficiary under the insured's life insurance policy at the time of the insured's death. The Sixth Circuit relying upon a prior decision of McMillan [citation omitted], held that the former wife did not waive her interest as a designated beneficiary "by reason of a broad waiver of rights in the couple's divorce decree." [Citation omitted] The Sixth Circuit also noted that the divorce decree in Pressley did not satisfy the requirements of a QDRO which would be "expressly exempt from ERISA preemption." Gibbs at 883-884. See also: Aetna Life Ins v Montgomery, 286 F Supp2d 832 (ED Mich, 2003).

Accordingly, a significant body of federal law jurisprudence within the Sixth Circuit Court of Appeals, including District Courts in the State of Michigan, have found the preemption provision of ERISA precludes enforcing a divorce judgment insurance waiver provision regarding payment of benefits to a designated beneficiary of an ERISA plan.

There is an exception to the ERISA preemption provision for state court divorce judgments when the requirements of a Qualified Domestic Relations Order are included in the Judgment of Divorce pleadings. This was analyzed by the U.S. District Court for the Eastern District of Michigan in Montgomery, supra, which stated:

It is well-settled, however, that state court divorce decrees and judgments purporting to affect the benefits payable from an ERISA policy are preempted. [Citation omitted] Generally, in such a case, a waiver of rights is ineffective and the ERISA plan administrator is obligated to pay benefits in accordance with the plan provision's documents. [Citation omitted]

There is, however, one exception to ERISA preemption: ERISA does not preempt state court divorce decrees or judgments where the state court order meets the requirements of a Qualified Domestic Relations Order (“QDRO”) under 29 USC 1056(D)(3). Montgomery at 837-838.

The QDRO exception requires certain information to be included in the Order from the Court to be enforceable, and is similar to the explicit waiver analysis adopted by the other Circuit Courts of Appeals in avoiding preemption.

Therefore, the ERISA preemption provision analysis adopted by the United States Sixth Circuit Court of Appeals requires ERISA benefits to be paid to the Plan’s designated beneficiary regardless of any divorce judgment provisions unless a specific reference is made to meet the requirement of a QDRO or explicit waiver. The decisions from the Sixth Circuit Court of Appeals regarding the application of federal law, rather than state law, is significant because of the possibility of removal to Federal Court for addressing of this issue, as discussed in Argument II.

D. Abbott Case

The recent decision by this Honorable Court in State Treasurer v Abbott, 468 Mich 143; 660 NW2d 714 (2003), does not require a different result. The facts of Abbott, supra, are significantly different from the circumstances presented in the instant case, and do not involve a non-designated beneficiary seeking collection of benefits, rather collection is sought merely as a creditor of the designated beneficiary. This Honorable Court properly found an Order was enforceable which mandated funds to be paid from a Department of Corrections inmate account for purposes of satisfying payment under the State Correctional Facility Reimbursement Act even though the account was funded by ERISA Plan payments. The account garnishment was not subject to ERISA preemption. The passage from Abbott, supra, most relevant to the circumstances and resolution of this case is the following:

We next consider whether the distribution of pension funds *after they are deposited in defendant’s account* contravenes ERISA. The prevailing view is that ERISA

does not protect pension funds after the beneficiary receives them. We adopt this view and hold that ERISA does not preclude distribution pursuant to the SCFRA after the funds are deposited in an inmate's account. Id at 153 (emphasis in original).

This passage correctly finds funds can be accessed after the beneficiary has received them; however, the important factor is the basis for a claim to such funds is not as a non-designated beneficiary under ERISA but pursuant to a separate statutory provision allowing the State to collect money for housing an inmate unrelated to any right to ERISA benefits. The basis for claiming entitlement to the ERISA proceeds is a significant factor in determining how to analyze the proper resolution of this case as to ERISA preemption, and the instant case requires a different result from Abbott, supra.

Thus, Plaintiff/Appellant, the designated beneficiary on the ERISA policy, must be permitted to retain the proceeds she received and not be subject to any collateral attacks by a non-designated beneficiary, either in the form of a waiver as done by the Michigan Court of Appeals in MacInnes, supra, or as an invalidation of the beneficiary designation as done by the dissent in Egelhoff, supra. The preemption policy of ERISA is applicable under the facts and circumstances of this situation and must be enforced by this Honorable Court.

ARGUMENT II

WHETHER THE ESTATE OF A DECEASED SPOUSE CAN SEEK A RECOVERY OF LIFE INSURANCE BENEFITS THROUGH THE STATE COURT WHICH HAD JURISDICTION OF THE INITIAL DIVORCE PROCEEDING, CONTRARY TO APPLICABLE FEDERAL LAW.

Defendant/Appellee seeks enforcement of the waiver provision of the Judgment of Divorce to collect the ERISA life insurance proceeds because a direct claim against the ERISA Plan Administrator was impermissible under controlling federal law in the Sixth Circuit Court of Appeals. A federal cause of action must be utilized to seek enforcement of a claim for entitlement to ERISA benefits, and must be brought pursuant to Section 502 of ERISA at 29 USC § 1132. See Ruble v Unum Life Insurance Company of America, 913 F2d 295 (CA 6 1990) and Tinsley, *supra*. A claim for ERISA benefits can be filed in either state or federal court; however, federal law ultimately determines the party entitled to the benefits in either court system. Thus, actions taken in Michigan, either in state or federal court, should look for guidance to the decisions by the Sixth Circuit Court of Appeals, and the District Courts of Michigan, to determine whether the claim for ERISA benefits is enforceable.

If Defendant/Appellee had brought a claim for enforcement of the ERISA benefits in the United States District Court for the Eastern District of Michigan, relief would have been denied due to the controlling decisions of the Sixth Circuit Court of Appeals in Metropolitan Life Ins v Pressley, *supra*, and Metropolitan Life Ins v Marsh, 119 F3d 415 (CA 6 1997). The Sixth Circuit Court of Appeals acknowledged it was adopting a minority rule as to application of the ERISA preemption provision rather than employing federal common law waiver analysis; however, it found the language of ERISA more consistent with its approach. Plaintiff/Appellant submits Pressley, *supra*, and Marsh, *supra*, foreshadowed the decision by the United States Supreme Court in Egelhoff, *supra* and should be followed by this Honorable Court to prevent forum shopping. The Sixth Circuit Court of Appeals stated in Pressley:

A law “relates to” an ERISA plan “if it has a connection with or reference to such plan.” [Citation omitted]
Inasmuch as section 552.101(2) would determine the distribution of benefits under the Plan if applied in this case, it has a connection with or reference to Alvin’s Plan, rendering ERISA preemptive. “[A] state law may ‘relate to’ a benefits plan, and thereby be pre-empted, even if the law is not specifically designed to affect such plans, or the effect is only indirect.” [Citation omitted]

This Court, as well as other Courts of Appeals, has previously decided that a designation of beneficiaries has a connection with or reference to an ERISA plan, preempting state law. [Citations omitted]

Although they agree that ERISA preempts state law regarding the designation of beneficiaries, the Courts of Appeals are split regarding the manner in which a beneficiary is then determined. [Citation omitted] Most of the Circuits that have considered the matter look to federal common law for the controlling principles. [Citations omitted] They hold that under federal common law a decedent’s ex-spouse may waive her interest as beneficiary of the decedent’s insurance plan. [Citations and footnote omitted]

The Sixth Circuit takes a different view and holds that ERISA itself supplies the rule of law. McMillan v Parrott, 913 F2d 311 (CA 6 1990). In McMillan, this Court considered essentially the same question that it faces in this case: whether under the provisions of ERISA the former spouse of a decedent waives her interest as designated beneficiary of the decedent by reason of a broad waiver of rights in the couple’s divorce decree. The McMillan Court answered that “the explicit provisions of ERISA make clear that [the decedent’s former spouse] did not effectively waive her interest as the [decedent’s] beneficiary. [Citation omitted]

Section 404(a)(1)(D) of ERISA requires that a plan administrator discharge his duties “in accordance with the documents and instruments governing the plan. . . . [citation omitted] The Court in McMillan found that

section to establish a clear mandate that plan administrators follow plan documents to determine the designated beneficiary. [Citation omitted] Accordingly, the Court held that the plan documents naming the decedent's ex-wife as beneficiary of the plan controlled, making her the decedent's beneficiary. Metropolitan Life Ins Co v Pressley at 129-130 (emphasis added).

Thus, actions for recovery of ERISA benefits within the jurisdiction of the Sixth Circuit Court of Appeals would be subject to the above analysis and precluded Defendant/Appellee from prevailing on a direct claim against Met Life. The United States Supreme Court employed similar analysis in deciding the Egelhoff, supra and Boggs, supra cases as noted above.

Additionally, the Sixth Circuit Court of Appeals has held an ERISA plan participant controls the designation of beneficiaries for the receipt of benefits from the ERISA plan. As the Court stated in Czarski v Bonk, 124 F3d 196 (CA 6)(1997) [unpublished opinion]:

We believe this resolution fulfills the intent of Congress that ERISA plans be uniform in their interpretation and simple in their application. A participant is master of his own ERISA plan. [The decedent plan participant] agreed to the plans, including the provision concerning the designation and change of beneficiary... but did not change the beneficiary.... Simply put, it was [the plan participant's] designation which controls, not [the ex-wife's] intent. Under the plans, we determine his intent by the designation on file at the time of his death.

Such a holding also allows the parties to be certain of their rights and obligations.... If the designation on file controls, administrators and courts need look no further than the plan documents to determine the beneficiary.... Id at 4. (Emphasis added)

These decisions by the Sixth Circuit Court of Appeals are consistent with the decisions by the United States Supreme Court as to the application of the preemption provision of ERISA in these types of situations. The analysis as announced in Boggs,

supra, and Egelhoff, supra, must be applied by this Court because it is the controlling federal jurisprudence for the federal statutory enactment. Plaintiff/Appellant is the designated beneficiary entitled to recover under the terms of the ERISA plan and to allow collateral attack by Defendant/Appellee in a state court action renders meaningless the ERISA preemption provision analysis in Boggs, supra. The approach approved by the Michigan Court of Appeals in MacInnes, supra, and advanced by Defendant/Appellee in this case, turns the entire concept of ERISA preemption on its head and eliminates the purposes Congress created such a federal statutory framework and established the QDRO as the only means of waiver of such benefits through a divorce proceeding, which is not present in this case.

A decision by this Honorable Court following the jurisprudence from the Sixth Circuit Court of Appeals and the United States District Court of Michigan is bolstered since these cases can be removed from state court to the federal court for resolution of the proper beneficiary of the ERISA proceeds. The United States Supreme Court, and the Sixth Circuit Court of Appeals, has consistently found determination as to the proper beneficiary for recovery of benefits from an ERISA covered plan is an exclusive federal cause of action and requires analysis of federal law for determining the appropriate result. As the Sixth Circuit Court of Appeals stated in Tinsley, supra:

In this case, Tinsley's claim is for payment of ERISA benefits, and it concerns the legitimacy of the beneficiary designation contained in the plan documents. The Supreme Court has explained that if sued by a beneficiary to recover benefits from an ERISA-covered plan "falls directly under §502(a)(1)(B) of ERISA [29 USC §1132(a)(1)(B),] which provides an exclusive federal cause of action for resolution of such disputes." Metropolitan Life Ins Co v Taylor, 481 US 58, 62-63; 107 S Ct 1542, 95 LEd2d 55 (1987). Moreover, this court has held that claims touching on the designation of a beneficiary of an ERISA-covered plan fall under ERISA's broad preemptive reach and are consequently governed by federal law. Tinsley at 704. See also: Ruble, supra. [ERISA creates a federal cause of action, enforceable either in federal district court or in any state court of

competent jurisdiction, where a plan beneficiary seeks “to recover benefits due to him under the terms of the plan, to enforce his rights under the terms of the plan, or to clarify his right to future benefits under the terms of the plan.”] Ruble at 297.

Accordingly, a judicial determination as to the appropriate recipient of benefits from an ERISA covered plan are subject to federal law, regardless of whether it is through a collateral action as in this case or a direct claim against the plan administrator. The United States Supreme Court in Boggs, supra, specifically indicated the collateral action determining the proper recipient of benefits shall be treated no differently than a direct claim being made against the plan administrator. Thus, any such legal action shall be covered under federal law whether filed in state court or federal court.

Plaintiff/Appellant is entitled to seek removal of this case to federal court regarding the proper recipient of ERISA benefits and the applicable preemption provision. The jurisdiction of the United States District Court of Michigan included removal of any cases asserting a federal cause of action from the state court into the federal court system. 28 USC §1331; §1441. 28 USC §1331 states:

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States. *Id.*

28 USC §1441 states:

(a) Except as otherwise expressly provided by an act of congress, any civil action brought in a state court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district court in division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenships of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the constitution, treaties or laws of the United States

shall be removable without regard to the citizenship or residence of the parties. Any other such actions shall be removable only if none of the parties in interest properly joined and served as defendants of the citizen of the state in which such action is brought.

(c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removal claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which state law predominates. *Id* (emphasis added).

This case was initiated in the state court alleging entitlement to ERISA life insurance proceeds albeit through the Judgment of Divorce previously entered. Thus, Plaintiff/Appellant may seek removal of this matter from the state court into the United States District Court for the Eastern District of Michigan under the above cited removal statutes because a cause of action arising under the laws of the United States, i.e. a federal question, exists. The decisions of the Sixth Circuit Court of Appeals establish the controlling authority for these cases upon removal to the United States District Courts in Michigan. Accordingly, this Honorable Court should not permit a different result to apply simply because the action was filed in the state court of Michigan rather than filed in, or removed to, the federal court. At a minimum, Plaintiff/Appellant should be permitted to seek removal of this action from the state court to the United States District Court for the Eastern District of Michigan to obtain the appropriate resolution consistent with the decisions in Boggs, supra and Egelhoff, supra.

Therefore, Plaintiff/Appellant asserts this case requires affirmance of the trial court's determination as to the applicability of the ERISA preemption provision, and rejection of the analysis by the Michigan Court of Appeals as to the issue of waiver. The controlling precedent for the State of Michigan in the federal court system has continuously determined the designated beneficiary is the proper recipient of the

proceeds and a waiver provision in the Judgment of Divorce will have no effect upon this designation. The United States Supreme Court has specifically found a collateral attack as to the designated beneficiary entitlement to benefits will not change the analysis and ERISA preemption thereby eliminates recovery of the ERISA benefits by a non-designated beneficiary. This Honorable Court must follow the precedent of the Sixth Circuit Court of Appeals as to the application of the ERISA preemption provision to prevent inconsistent results for cases in this state applying the federal law of ERISA especially with the possibility of removal of the case to the federal court system.

Conversely, not following the jurisprudence of the Sixth Circuit Court of Appeals would allow parties to forum shop as to the application of the federal statutory provision and lead to inconsistent and diametrically opposed results from the same factual scenarios dependent on the case being adjudicated in a Michigan state or federal court. Thus, this Honorable Court must follow the precedent of the United States Supreme Court in Boggs, supra, the various decisions by the Sixth Circuit Court of Appeals, and decline to follow the waiver analysis proposed by the Michigan Court of Appeals in MacInnes, supra, and asserted by Defendant/Appellee to avoid the inconsistency in similar factual situations.

The likelihood of inconsistent decisions from the Michigan state courts in comparison to the federal courts are illustrated by the companion case this court is reviewing, Pruchno, supra, and the recently unpublished decision of Moore v Moore, [unpublished Court of Appeals, Docket No. 251822 (4/28/05)]. The Michigan Court of Appeals have consistently reached different results than the decisions rendered by the Sixth Circuit Court of Appeals and the District Courts of Michigan regarding preemption versus waiver even though they involve the same issue of federal law and can be removed to the federal court system. Ironically, the legislative purpose for the ERISA preemption provision would be thwarted by these different results because inconsistent results within the same geographic area would occur dependent upon whether a state court or federal court forum was selected to resolve the matter.

ARGUMENT III

WHETHER THE TRIAL COURT SHALL RETAIN JURISDICTION TO REVIEW THE PROPRIETY OF PLAINTIFF/APPELLANT'S DESIGNATION AS THE BENEFICIARY OF THE ERISA COVERED LIFE INSURANCE PLAN IF THE ERISA PREEMPTION PROVISION IS FOUND INAPPLICABLE.

Plaintiff/Appellant alternatively requests this Honorable Court remand the case to the trial court if the ERISA preemption provision is found inapplicable and the insurance waiver provision of the Judgment of Divorce is enforceable. The Michigan Court of Appeals issued a preemptory reversal without any additional analysis reviewing the Trial Court decision, nor other issues presented. Plaintiff/Appellant raised the issue as to whether she was intended to be the designated beneficiary by her deceased ex-husband at the time of his death, despite the provision in the Judgment of Divorce. Evidence will be brought forward establishing the cause of death for Plaintiff/Appellant's deceased ex-husband was a suicide with a note left by him indicating certain financial arrangements had been contemplated for his children. An opportunity for a full and complete hearing should be made available to determine whether the intentions of the decedent will be satisfied in any way other than having Plaintiff/Appellant as designated beneficiary. The trial court had not conducted any hearing on this matter due to the decision regarding application of the ERISA preemption provision precluding any relief sought by Defendant/Appellee.

Plaintiff/Appellant requests the equitable powers of a trial court in a divorce action be permitted to review the facts of this case. Thus, relief is only necessary if this Honorable Court finds the ERISA preemption provision does not negate the waiver provision in the Judgment of Divorce and reverses the decision of the trial court.

Furthermore, this Honorable Court should permit the opportunity for Plaintiff/Appellant to seek removal of the action to the United States District Court for the Eastern District of Michigan for the reasons articulated in the previous section. There was insufficient opportunity for removal to be sought when the matter was

before the Trial Court as a result of the decision denying the relief sought by Defendant/Appellee and no precedential contrary authority existing at that time in the State of Michigan. As articulated in the previous section, the determination as to the proper recipient of ERISA benefits, as a beneficiary, is a matter exclusively determined as a federal law question subject to removal pursuant to the appropriate statutory provisions in the United States Code. Plaintiff/Appellant has been denied the opportunity to seek this type of relief as a result of the preemptory reversal by the Michigan Court of Appeals and the matter not otherwise being subject to presentation to the Trial Court.

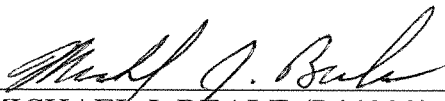
Therefore, Plaintiff/Appellant requests this Honorable Court, as an alternative to reversing the Michigan Court of Appeals resolution, remand the matter to the Trial Court to address the issues as to the decedent's intentions regarding the designated beneficiary and/or to pursue the possibilities of removal to the United States District Court for the Eastern District of Michigan.

RELIEF REQUESTED

Plaintiff/Appellant requests this Honorable Court reverse the preemptory reversal entered by the Michigan Court of Appeals, and affirm the decision by the 42nd Circuit Court for the County of Midland. The Michigan Court of Appeals relied upon the improperly decided precedent of MacInnes, supra, in reversing the Trial Court decision regarding application of the ERISA preemption provision. This Honorable Court must rectify the error for the benefit of the jurisprudence of this state and to properly interpret the federal law under the ERISA statutes.

Alternatively, Plaintiff/Appellant seeks remand for further proceedings to determine if the ex-husband decedent in this case intended to keep Plaintiff/Appellant as the designated beneficiary of the ERISA life insurance policy despite the provision in the Judgment of Divorce or to permit removal of the United States District Court for the Eastern District of Michigan. The preemptory reversal by the Michigan Court of Appeals precluded any analysis on these issues.

Respectfully Submitted,



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/smg